

U.S. Department of Labor

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Issue Date: 21 November 2002

CASE NO.: 2002-ERA-00015

IN THE MATTER OF

**TERRY O. PUCKETT,
Complainant**

v.

**TENNESSEE VALLEY AUTHORITY,
Respondent**

APPEARANCES:

**EDWARD A. SLAVIN, JR., ESQ.
On behalf of the Complainant**

**DILLIS D. FREEMAN, JR., ESQ.
On behalf of the Respondent**

**Before: LARRY W. PRICE
Administrative Law Judge**

**RECOMMENDED DECISION AND ORDER OF DISMISSAL FOR
FAILURE TO COMPLY WITH LAWFUL ORDERS**

In a complaint filed with the Occupational Safety and Health Administration (OSHA) on December 18, 2001, Terry O. Puckett (Complainant) alleged that Tennessee Valley Authority (Respondent) retaliated against him because of his protected activities under the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851 (1994) and the regulations at 29 C.F.R. Part 24 (2001); the Clean Air Act (CAA), 42 U.S.C. § 762; the OSHA Act, 29 U.S.C. § 651; the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901; the Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971; the Water Pollution Control Act (FWPCA), 33 U.S.C. § 1367; and the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622. On February 14, 2002, OSHA dismissed the complaint, finding that it was unable to verify that discrimination was a factor in the actions that gave rise to Puckett's claims, and in addition, that Puckett failed to timely file his complaint. On February 22, 2002, Puckett appealed that decision.

The Court recommends the case be dismissed for Puckett's failure to comply with the Court's lawful orders. A review of the background of the case is necessary to put this recommendation into perspective.

By Order dated March 5, 2002, the Court set the matter for hearing on April 16, 2002. The Court ordered that all discovery be concluded ten days prior to the hearing. The Court advised the Parties that absent prior explicit permission, filings by facsimile (fax) would not be accepted.

On March 11, 2002, TVA requested a delay in the hearing. On March 12, 2002, TVA advised the Court that one of the reasons for the requested continuance had been resolved. On March 13, 2002, my office contacted Puckett's counsel (Counsel) and requested his position on the requested delay. Counsel filed a letter on March 13, 2002, but did not then or later indicate his position concerning the continuance. As 29 C.F.R. § 24.6(a) provides that no postponements shall be granted except for compelling reasons or with the consent of all parties, and having received no response from Counsel, on March 26, 2002, the Court denied TVA's Motion for Continuance.

On March 22, 2002, TVA filed a Motion for Summary Decision.

On March 26, 2002, Counsel faxed to the Court a Motion to Quash Notice of Deposition and a Motion for Protective Order as to TVA's Request for Production of Documents. Counsel advised that he would be unable to attend Puckett's deposition that was scheduled for March 28, 2002. By fax dated March 27, 2002, Counsel advised the Court that he acquiesced in TVA's Motion for Continuance. By Order dated March 28, 2002, the Court again denied TVA's Motion for Continuance and set April 9, 2002, as the date for filing a response to the Motion for Summary Decision. This Order was faxed to Counsel along with a note that on March 27 and March 28, the Court had attempted to contact him regarding his request for a conference call but got a message that his voice mail was full.

On April 1, 2002, Puckett requested, via fax, a continuance in the hearing, the date for depositions and the date for responding to the Motion for Summary Decision. A telephone conference call was held at the request of Counsel on April 1, 2002. Based upon the agreement of the Parties, the Court rescheduled the hearing for June 4, 2002. The Parties agreed that Puckett's deposition would take place the week of April 22, 2002, and that Puckett would respond to TVA's discovery requests (served on March 20, 2002) the week prior to the deposition. The Court was advised that Puckett might submit his own discovery request. May 17, 2002, was set for Puckett's reply to the Motion for Summary Decision. In its Order, the Court again advised the Parties that absent prior explicit permission, filings by facsimile (fax) would not be accepted.

Puckett's deposition was noticed for April 23, 2002. In spite of the fact that Counsel had agreed to Puckett's deposition during the week of April 22, 2002, by letter dated April 15, 2002, Counsel moved for a protective order as the deposition might take up too much of his time and the notice lacked sufficient notice of the topics and the name of the court reporter. Counsel further requested the Court be available for discovery conference calls during Puckett's deposition and other

depositions that he might decide to take. By letter dated April 16, 2002, Puckett filed a Motion for Simultaneous Exchange of Discovery Responses. By a second letter dated April 16, 2002, Puckett restated these same requests. All these letters were received by fax.

On April 17, 2002, the Court received TVA's Response to Puckett's Motion for Protective Order. TVA noted that it first served the deposition notice and request for production on March 20, 2002. TVA states that the topic of the deposition would be the basis of Puckett's allegations in the Complaint and identified the court reporting company that would be taking the deposition. In a separate motion, TVA moved to compel responses to its March 20, 2002 discovery request. TVA also responded to the request for simultaneous exchange of discovery responses. TVA noted that Puckett's discovery request was not served until April 7, 2002. The Court notes that Puckett's discovery request itself did not seek production until May 7, 2002. Attached to TVA's Response were Notices of Deposition for Puckett. The depositions were previously set for March 28 and April 4, 2002, with requests that documents be provided prior to the depositions.

On April 17, 2002, the Court denied the Motion for Protective Order and the request to reschedule Puckett's deposition. The Court further ordered Puckett to provide all documents responsive to TVA's request for production of documents no later than 1:00 p.m. on April 19, 2002. The Court faxed this Order to Counsel and TVA.

That same afternoon Counsel faxed a motion for an on the record conference call on the morning of April 18, 2002. Puckett suggested "that the Court be prepared to address":

1. The Court's legal and factual reasons for:
 - A. Declining to order remand for investigation;
 - B. Not granting Puckett's discovery motions or addressing their merits;
 - C. Not ordering simultaneous exchange and production of discovery;
2. The federal constitutional requirement for a neutral decision maker;
3. DOL's historic desuetude of whistleblower law enforcement in states under suzerainty of the Atlanta and Dallas OSHA offices, including OSHA's apparent unlawful refusal to investigate Puckett's case; and
4. Whether the Court has been prejudiced against or for any party of any counsel.

That same afternoon Counsel faxed a letter renewing the motions he had made in his April 15, 2002 letter and which were denied in the Court's April 17, 2002 Order.

Further, on April 18, 2002, Counsel sent a letter to District Chief Judge Mills seeking his views on the foregoing matters and my rulings. Counsel noted that he was not requesting "formal peer review at this time." A copy of this letter was faxed to the Court.

On April 18, 2002, the Court denied the request for an on the record conference call and the request for simultaneous exchange of discovery. The Court did shorten the time for TVA's response to discovery to April 30, 2002. The Parties were advised that the Court's Orders dated April 2, 2002,

and April 17, 2002, set specific dates for the accomplishment of certain tasks and the Court expected these tasks to be accomplished as ordered. The Court faxed the Order to the Parties.

Within minutes of the Court's Order being faxed, the Court received by fax Puckett's five page Emergency Motion requesting "that the Court vacate the April 17, 2002 Order in this matter and modify the schedule agreed to by the parties." Counsel also requested a conference call.

Waiting for me on my arrival at the office on April 19, 2002, was a two page Supplement to the Motion that had been faxed the previous evening. Despite the fact that the Court had advised the Parties that absent prior explicit permission, filings by facsimile (fax) would not be accepted, every ruling by the Court was followed by a flurry of unauthorized faxes from Counsel. As requested by Counsel, the Court held a conference call on April 19, 2002.

The May 24, 2002 affidavit submitted by Linda J. Sales-Long to the Administrative Review Board is an accurate summary of the conference call. The Court began by stating that the Parties had agreed to the deadlines set in my previous orders and that I thought my previous orders were clear. Counsel then accused me of not reading his submissions. For the first time, Counsel indicated that he had two briefs due the following week. I stated I had read all his submissions and had found nothing to support his various motions and there was nothing in any of his submissions about a schedule conflict. Counsel then began to ask questions concerning my military background. I told Counsel that the purpose of the conference call was not to interrogate me but to give him the opportunity to present any matters that might be relevant to the motions. I then inquired about the pending briefs and Counsel responded that he would not be interrogated and refused to answer my inquiries. I then informed Counsel that my previous orders were clear and I expected compliance. His response was, "We'll see about that."

At no time during the conference call did I raise my voice, become abusive or snap my fingers as alleged by Counsel in his various correspondence to Judge Mills, Judge Vittone and the ARB.¹

On April 19, 2002, the Court was notified by fax that Puckett had filed an interlocutory appeal with the ARB. The Court was advised that Puckett would not be available for deposition or provide documents until the ARB had ruled. By Orders dated April 19 and May 10, 2002, the Court suspended further proceedings until the ARB ruled on the interlocutory appeal.

During the course of the interlocutory appeal, Counsel made the following comments concerning the Court:

1. Abusing the public trust, snapping his fingers, ALJ was irascible, conducted himself like a martinet, violated DOL standard of conduct, spoke in an ominous, threatening manner, subjected Puckett to a Procrustean bed.

¹ In fact, I cannot snap my fingers.

2. ALJ may be extremely preoccupied, conducts himself in a hierarchical, authoritarian, demeaning, aggressive and uncivil manner.
3. Resembles Captain Queeg in The Caine Mutiny.
4. Bad judging, bad manners and misapplication of the law by biased judges.
5. Judge has a chip on his shoulder and a mental state that suggests he should be referred for a psychiatric fitness-for-duty exam and undergo sensitivity training.
6. Misfeasance, malfeasance and/or nonfeasance.
7. Some military-minded DOL ALJs sometimes show heartlessness.
8. Judge is a *de facto* defense lawyer.
9. Judge contaminated the reservoir.
10. Judge showed lack of objectivity and displeasure with citizens suing the government.
11. Judge acted as a cat's paw for federal agencies.
12. Judge treated Puckett like a digit to be counted or a minority to be marginalized.
13. Judge behaved badly, frozen in the ice of his own indifference.
14. Judge shows disdain, hostility and bias.
15. Judge's actions were both secret law and underlaw (lawbreaking by government officials charged with enforcing the law).
16. Judge gave only a wink and a nod at Due Process.
17. Judge is insensitive bordering dangerously upon mind-altering bias.
18. Judge exhibited extreme unfairness.
19. Counsel is embarrassed that a once-great organization would have ever hired me as a judge.
20. Judge is universally prejudiced against whistleblowers.
21. Judge's lack of objectivity tarnishes DOL's reputation for fairness.

During the interlocutory appeal, TVA sought to strike Puckett's brief as it contained scandalous, disparaging, and impertinent remarks about the ALJ. While denying the motion, the ARB shared TVA's concern that the parties at the very least comply with the most basic elements of decorum required of a legal professional. The ARB found Puckett's argument, while clearly on the razor's edge of acceptability, was not quite of the same degree of immaterial, offensive excoriation for which they sanctioned Counsel in Pickett v. TVA, ARB No. 00-076, ALJ No. 99-CAA-25 (ARB Nov. 2, 2000). The ARB reiterated that unsupported, gratuitous disparagement of an ALJ's integrity and ability does not serve the interest of Counsel's client and the use of odiums, sarcasm and vituperative remarks have no place in a brief and are wholly unwarranted. The ARB noted that resort to the use of such statement is an indication of a lack of confidence in the law and the facts to support the position of the one using them.

Upon receipt of the ARB's Final Order Denying Complainant's Interlocutory Appeal, by Order dated October 1, 2002, the Court again set the case for hearing and set a discovery schedule similar to that agreed to by the Parties at the April 1, 2002 telephone conference. The Court ordered Complainant to provide all documents responsive to Respondent's request for production of documents in such a manner as to ensure that Respondent would receive them no later than October 11, 2002. The deposition of Complainant was to be completed between October 14, 2002, and October 31, 2002, and Respondent was to provide all documents responsive to Complainant's discovery request no later than three days after completion of Complainant's deposition. Complainant's reply to Respondent's Motion for Summary Decision was due on November 12, 2002. The Parties were again reminded that absent prior explicit permission, filings by fax would not be accepted.

By letter dated October 7, 2002, Counsel again asked that the case be remanded to OSHA for investigation and advised the Court that he sent the discovery documents, not to TVA, but to District Judge Mills for safekeeping only to be sent to TVA upon its agreement to simultaneous exchange. In the letter to Judge Mills, and in spite of the ARB's admonishment that unsupported, gratuitous disparagement of an ALJ's integrity and ability does not serve the interest of Counsel's client and the use of odiums, sarcasm and vituperative remarks have no place in a brief and are wholly unwarranted, Counsel continued his verbal assault on the Court. Counsel's remarks included:

1. That I be referred to a board-certified psychiatrist for review of my abrasive, insulting, martinet personality, which boards dangerously on diagnosable mental illness.
2. That I am below the standard of care and behind the time.
3. That I show signs of Section 8 behavior.
4. That I treat persons appearing before me as subordinates and act in a rude manner.

5. Implying that I have cruel behavior, am immature, surly and seemingly intoxicated with power, acting like a demigod and behaving insensitively due to reasons of ego, insecurity and arrogance.
6. Implying that I have a diagnosable psychiatric condition and suggesting that I be placed on a sabbatical for treatment.
7. That I engaged in rude, callous behavior and that I should attend sensitivity training and possibly be removed from my position.

On October 9, 2002, I denied the Motion for Remand and advised the Parties that I expected compliance with the October 1, 2002 Scheduling Order.

On October 15, 2002, the Court, having received a copy of Complainant's October 9, 2002 letter to Judge Mills in which Complainant indicates that he has no intention of complying with the Court's October 1, 2002 Order, ordered Puckett to Show Cause as to why the complaint should not be dismissed for Complainant's failure to comply with the Court's Order.

By letter dated October 22, 2002, Complainant advised the Court that on that day he would be sending the box of documents returned by Judge Mills to TVA by priority mail, under protest, preserving all rights and remedies. I advised the Parties that the Court's October 16, 2002 Order To Show Cause and the October 1, 2002 Scheduling Order remained in effect. TVA received the discovery documents on October 25, 2002.

Upon receipt of the Scheduling Order, TVA had contacted Counsel to set a date for the deposition of Puckett. As Counsel failed to contact TVA concerning dates for the deposition, on October 4, 2002, TVA noticed Puckett's deposition for October 28, 2002. There is no indication that at any time prior to Friday, October 25, 2002, Counsel ever indicated any problem with the scheduling of Puckett's deposition for Monday, October 28, 2002.

On the afternoon of October 25, 2002, (the last business day before the scheduled deposition) Counsel contacted my secretary and requested permission to fax "Motions" to the Court. Based on the past abuses of Counsel, the request was denied. In spite of the lack of permission to fax documents to the Court, Counsel faxed a request that the deposition be conducted telephonically citing schedule conflicts. Counsel was advised that the Court expected its prior Orders to be carried out. TVA contacted Counsel and informed him that they would be in Huntsville for the deposition as scheduled. Due to the fact that Puckett had not provided the discovery documents as ordered by the Court, TVA was unable to do a telephone deposition as belatedly requested by Counsel. Counsel advised TVA to stay in Knoxville and save the ratepayers money.

On October 28, 2002, TVA and the court reporter were in Huntsville for Puckett's deposition. Neither Puckett nor Counsel appeared.

On October 28, 2002, the Court received a copy of an October 25, 2002 letter to Judge Mills. Counsel mischaracterized his request to the Court as a request to send a one page document by fax. In reality, the request was to fax “motions.” Counsel then again accused the Court of being a “cat’s paw” for TVA and questions my judicial temperament and fitness.

On October 29, 2002, Complainant filed his Response to the Show Cause Order. Complainant’s complete response follows:

The Court’s Order to Show Cause, should be vacated, as Mr. Puckett (after reasonably and seasonably requesting reconsideration while sending his documents to Judge Mills) timely provided his documents to TVA once the documents were returned by Judge Mills and Judge Price rejected his appeal for fairness and equal treatment. Facing permanent prejudice, Mr. Puckett acted reasonably to protect his rights. For DOL to become “one great system for the administration of justice,” it must reject “justice-defeating technicalities” like those suggested by the Court and urged by TVA. Internatio-Rotterdam, Inc. v. Thomson, 218 F.2d 514, 517, 531 (4th Cir. 1955).

The remaining two paragraphs of the Response concern Counsel and Puckett’s failure to attend the October 28, 2002 deposition.

On or about October 31, 2002, the Court received a copy of Judge Vittone’s October 28, 2002 letter to Puckett and Counsel. Apparently, Counsel had filed a request for peer review which included charges that I was mentally unbalanced. As stated by Judge Vittone, this is the kind of “unsupported, gratuitous disparagement of an ALJ’s integrity and ability” about which the ARB had exorcized Counsel previously in this case.²

On October 31, 2002, the Court received Puckett’s request for a telephone deposition that represented that Counsel “has schedule conflicts that preclude his being in Alabama early next week.” By Order dated November 1, 2002, the Court ordered Counsel to identify the “schedule conflicts” and include the date the “schedule conflict” was set and include copies of any orders or other papers setting the “schedule conflicts” for October 28 or October 29, 2002, and identify efforts to reschedule the “schedule conflicts” and indicate whether he had attended the “schedule conflicts.”

On November 9, 2002, Counsel filed a response. Counsel only cited an October 31 deadline for an ARB brief in a Lockheed Martin case and a State Court of Appeals brief in a medical malpractice case. Counsel did not provide any papers setting the dates these briefs are due, identified

² It is not only the Court that has been the object of Counsel uncivil remarks. During a telephone conversation with TVA counsel following Puckett’s aborted deposition, Counsel allegedly called TVA’s counsel uncharitable, unchristian like, dishonest and unethical. Counsel has compared TVA to a serial murderer who is still at loose in the community and still commits murders.

no effort to reschedule the due dates for the briefs and did not indicate whether he filed the briefs. Further, nowhere has Counsel ever indicated any reason why he did not return TVA's telephone calls attempting to schedule Puckett's deposition nor any reason why he waited until the afternoon of the last business day before the scheduled deposition to attempt to notify the Court or TVA of this alleged "schedule conflict."

DISCUSSION

The regulatory "Procedures for the Handling of Discrimination Complaints Under Federal Employee Protection Statutes" provide as follows:

(4) *Dismissal for cause.* (i) The administrative law judge may, at the request of any party, or on his or her own motion, issue a recommended decision and order dismissing a claim:

(A) . . .

(B) Upon the failure of the complainant to comply with a lawful order of the administrative law judge.

(ii) In any case where a dismissal of a claim, defense, or party is sought, the administrative law judge shall issue an order to show cause why the dismissal should not be granted and afford all parties a reasonable time to respond to such order. After the time for response has expired, the administrative law judge shall take such action as is appropriate to rule on the dismissal, which may include an order dismissing the claim, defense or party.

29 C.F.R. §§ 24.6(e)(4). The Secretary of Labor has previously recognized that "[d]ismissal with prejudice is warranted only where there is a clear record of delay or contumacious conduct and a lesser sanction would not better serve the interests of justice." Billings v. Tennessee Valley Authority, 89-ERA-16, and 25, 90-ERA-2, 8, and 18 @ 3 (Sec'y July 29, 1992) (citing Consolidation Coal Co. v. Gooding, 703 F.2d 230, 232-33 (6th Cir. 1983)).

The facts of the instant case are remarkably similar to the facts in Malpass v. General Electric Co., 85-ERA-38 (Sec'y Mar. 1, 1994). In Malpass, the question of the authority of an ALJ to impose sanctions for failure to comply with his orders was at issue. Counsel for Malpass had requested a continuance in the hearing as he had a brief due and had another unspecified commitment. Malpass argued that the ALJ had no discretion to deny the request for continuance once counsel had identified prior judicial commitments. The Secretary disagreed, stating:

The nature of the prior commitment must constitute “good cause” just as any other reason for a continuance. The circumstances of this case are an excellent example of why the ALJ retains discretion to evaluate the nature of the prior commitment in deciding whether to grant the continuance. An argument scheduled in the Supreme Court on the same day as the hearing, for example, would present a fairly compelling case for a continuance. At the other end of the spectrum are cases such as this where counsel have briefs due Few trial lawyers do not have several cases in active litigation with many overlapping due dates to be met. The ALJ must have discretion to evaluate the nature and extent of these competing commitments or control of administrative proceedings will be in the hands of counsel, not the ALJ.

The authority of an ALJ over the course of a hearing is analogous to that of a federal district judge over pre-trial and trial proceedings. Here too, the courts of appeal have sustained the broad discretion of district judges to grant or deny continuances. In *Leve v. Schering Corp.*, 73 F.R.D. 537 (D.N.J. 1975), aff’d 556 F.2d 567 (3rd Cir. 1975), plaintiffs failed to appear for their depositions and to produce documents, and offered as a reason for that failure and as grounds for a continuance the personal difficulties of their counsel - the death of an associate, the medical leave of a partner. Rejecting these grounds, and denying a continuance, the district court said “if the personnel problems were so serious, no explanation is given of the failure to turn the case over to someone else. Plaintiffs’ interests required that this matter be given attention, and if present counsel was unable to do so, he had a professional obligation to see that someone else who could do so be engaged.” 73 F.R.D. at 540.

The Secretary held that the ALJ did not abuse his discretion in rejecting the stated grounds for a continuance, that is, the briefs due in English v. General Electric and another unspecified commitment, and the need for the Wage-Hour Final Investigation Report to prepare for trial. The Secretary reiterated that a conflict like filing a brief is the type of commitment which the ALJ must have discretion to evaluate, and some clear showing of prejudice to the moving party must be made before an abuse of discretion can be found.

I believe the instant case is an example of what the Secretary meant when he stated, “The ALJ must have discretion to evaluate the nature and extent of these competing commitments or control of administrative proceedings will be in the hands of counsel, not the ALJ.” In this case the Court did not even have an opportunity to exercise its discretion as Counsel took matters totally out of the Court’s hands and did only as he wanted to do. Counsel was dilatory in bringing the matter of his pending briefs to the attention of the Court and TVA. In April, there was no hint of a brief causing

a schedule conflict until the telephone conference. Then Counsel refused to answer the Court's inquiries concerning these matters. The Court never had the opportunity to evaluate the merits of the request as Counsel took matters into his own hands. Rather than learn from this experience, in October Counsel repeated the same conduct. He again waited until the last possible moment to alert TVA and the Court of his unspecified schedule conflicts. When Counsel finally brought the matter to the Court's attention, he failed to provide the information requested by the Court. Counsel never provided any papers setting the dates these briefs were due, identified no effort to reschedule the due dates for the briefs and did not indicate whether he filed the briefs. Further, nowhere has Counsel ever indicated any reason why he did not return TVA's telephone calls attempting to schedule the Puckett's deposition nor any reason why he waited until the afternoon of the last business day before the scheduled deposition to attempt to notify the Court or TVA of this alleged "schedule conflict."

In Malpass the Secretary proceeded to discuss whether dismissal could be ordered for the misconduct of a party's attorney. Citing Link v. Wabash Railroad Co., 370 U.S. 626 (1962), the Secretary stated:

In *Link*, the Court also found "no merit" to the argument that dismissal for the misconduct of one's attorney is unjust to the party. "Petitioner voluntarily chose this attorney . . . and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. . . . [A] party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all the facts, notice of which can be charged upon the attorney.'" *Id.* at 633-34 (citation omitted).

In cases applying *Link*, the courts of appeals have recognized a tension between a court's power to prevent delays and the public policy that cases should be decided on their merits. The Fourth Circuit has said that "dismissal 'must be tempered by a careful exercise of judicial discretion' [and] is permitted 'only in the face of a clear record of delay or contumacious conduct by the plaintiff.'" *Reizakis v. Loy*, 490 F.2d 1132, 1135 (4th Cir. 1974) (citation omitted). The Fourth Circuit has established four factors which should be considered before dismissing a case for failure to prosecute: 1) the plaintiff's degree of personal responsibility; 2) the amount of prejudice caused the defendant; 3) the presence of a drawn out history of deliberately proceeding in a dilatory fashion; and 4) the effectiveness of sanctions less drastic than dismissal. *Herbert v. Saffell*, 877 F.2d 267, 270 (4th Cir. 1989).

A key factor in many cases is whether there was a deliberate attempt to delay, or only sloppiness or a lackadaisical attitude of a party's attorney. *Herbert v. Saffell*, 877 F.2d at 270. ("[W]e do not condone the lackadaisical response [of plaintiffs counsel to] the district court's

deadlines [but] we see no evidence of deliberate delay.”); *Hillig v. Commissioner of Internal Revenue*, 916 F.2d 171, 174 (4th Cir. 1990) (“The record indicates sloppiness and a lack of communication, but it does not support a conclusion that the delay was deliberate.”) *See also Roland v. Salem Contract Carriers, Inc.*, 811 F.2d 1175, 1177 (7th Cir. 1987) (dismissal for failure to prosecute under rule 41(b) should be granted “only when there exists a clear record of delay or contumacious conduct or when less drastic sanctions have proven ineffective.”)

The Seventh Circuit has held that deliberate abuses of the trial court’s authority by an attorney justify dismissal. *Pyramid Energy, Ltd. v. Heyl & Patterson, Inc.*, 869 F.2d 1058 (7th Cir. 1989). . . . The court rejected Pyramid’s argument that it should be excused because the abuses were those of its attorneys, holding that “a court may dismiss an action with prejudice against a plaintiff for the actions of counsel [because] a party who chooses his counsel freely should be bound by his counsel’s actions.” *Id.* (Footnote omitted.) The court explained “[o]therwise, the court’s power to control its docket, and compel attorneys to proceed within the time frame set by the court and not their own would erode and eventually disappear. . . . A trial court is entitled to say, under proper circumstances, that enough is enough . . . and less severe sanctions than dismissal need not be imposed where the record of dilatory conduct is clear.” *Id.* at 1062.

In this case, it is clear from the record that Complainants’ counsel engaged in delaying tactics without justification. As discussed above, the failure to the Department of Labor to respond favorably to counsel’s FOIA request for the unredacted Wage-Hour investigation report is not an acceptable reason for refusing to proceed with discovery or go to trial. The ALJ also acted well within his discretion in denying counsel’s request for a continuance. When the ALJ denied counsel’s request on October 30, 1985 for a protective order postponing depositions of Complainants, counsel directed his clients not to appear, and again directed his clients not to comply with the ALJ’s order of November 15, 1985 to appear for depositions on November 22 and 23, 1985. When the ALJ’s order was read to him over the phone the day it was issued, counsel expressed contempt for it and the ALJ, saying he would not comply with it. Having lost their attempts to delay the proceedings before the ALJ, as well as their request to the Secretary for a stay pending appeal, neither Complainants nor their counsel appeared for the hearing or even notified the ALJ or opposing counsel that they would not appear. This

is exactly the kind of dilatory and contumacious conduct an ALJ need not condone. *Pyramid Energy, Ltd. v. Heyl & Patterson, Inc.*, 869 F.2d 1058, 1061. In these circumstances, the ALJ need not have considered whether other sanctions short of dismissal were appropriate.

From the beginning of this case Counsel has repeatedly failed to comply with the Court's orders and has displayed contumacious conduct sufficient to warrant dismissal. Despite the Court's advisement, Counsel repeatedly bombarded the Court with faxes without seeking prior authorization. Despite the Court's efforts to obtain Counsel's views on TVA's request for continuance, Counsel chose to ignore the Court and did not indicate whether he agreed to or opposed the requested continuance. Despite TVA's timely attempts to obtain documents through discovery and to depose Puckett, Counsel waited until March 26, 2002, to advise that he would be unable to attend the March 28, 2002 deposition.

On April 1, 2002, Counsel suggested and agreed to the schedule set by the Court for discovery. TVA immediately scheduled the deposition for Puckett. Counsel waited until April 15, 2002, to object to the notice of deposition and at no time ever mentioned any schedule conflicts. The Court attempted to make it clear that absent good cause, the Court expected discovery to proceed as agreed to and as directed by the Court. Every attempt by the Court to this end was met with another untimely request from Counsel. At this point, Counsel's only argument against the agreed to discovery schedule was that he no longer agreed.

At the telephone conference on April 19, 2002, for the first time Counsel indicated he had a schedule conflict in that he had two briefs due the next week. This obviously raised many questions such as 1) why did he suggest and agree to the deposition date; 2) when were these briefs scheduled; 3) why didn't he mention the briefs in his correspondence; and 4) why did he wait until the last minute to reveal this schedule conflict. However, Counsel refused to answer any of the Court's inquiries. The Court again cites the affidavit submitted by Sales-Long as an accurate summary of the conference call and of Counsel's conduct.

As the Secretary noted in Malpass, an ALJ must have discretion to evaluate the nature and extent of competing commitments or control of administrative proceedings will be in the hands of counsel. Counsel attempted to take this control away from the Court by his last minute notification of alleged conflicts and then refused to answer the Court's inquiries concerning these alleged conflicts.

During the course of the interlocutory appeal, Counsel continued his scandalous, disparaging and impertinent remarks. Counsel was warned by the ARB regarding his use of odiums, sarcasm and vituperative remarks. The ARB noted Counsel has engaged in such unprofessional conduct in the past and has previously been sanctioned for immaterial, offensive excoriation.

Following denial of the interlocutory appeal, the Court set a discovery schedule similar in timing to that agreed to by the Parties at the April 1, 2002 telephone conference. The Court gave

Puckett eleven days to provide his discovery responses to TVA. Rather than comply with the Court's Order, Counsel chose to send the discovery to Judge Mills for safekeeping only to be sent to TVA upon its agreement to simultaneous exchange. Rather than heeding the warning from the ARB, in his letter to Judge Mills and a letter to Judge Vittone, Counsel has heightened his verbal assault to include suggestions that I suffer from diagnosable mental illness. In his letter to Judge Mills, Counsel made it perfectly clear that he had no intention of complying with my Scheduling Order.

Puckett's response to the Order to Show Cause showed nothing other than that Counsel's actions were deliberate and again suggested the Court's Order should be rejected as a justice-defeating technicality. Puckett's response does not deny that Counsel failed to comply with the Scheduling Order and gives no reason for his failure to comply with the Scheduling Order. I find Counsel's failure to comply with the Scheduling Order was a deliberate, unjustified delaying tactic and a deliberate expression of contempt for the Court

As stated by the Secretary in Malpass, a key factor in many cases is whether there was a deliberate attempt to delay, or only sloppiness or a lackadaisical attitude. Beyond a shadow of a doubt, Counsel was engaged in a deliberate attempt to delay the orderly processing of the case and to engage in disparagement of the Court's integrity. When Counsel was informed that the Court expected him to be at the April deposition, Counsel expressed contempt for the Court by stating, "We'll see about that." When he sent documents to Judge Mills he deliberately chose to include unsupported, gratuitous disparagement of the Court's integrity.

I note that the abuse came from Counsel and not from Puckett. However, all the documents containing disparagement of the Court's integrity were served on Puckett and he was thus fully aware of the odiums, sarcasm and vituperative remarks being made by Counsel. As stated by the Court in Pyramid Energy, Ltd. v. Heyl & Patterson, Inc. 869 F.2d 1058 (7th Cir. 1989) and as cited by the Secretary in Malpass, "[A] court may dismiss an action with prejudice against a plaintiff for the actions of his counsel because a party who chooses his counsel freely should be bound by his counsel's actions . . . otherwise, the court's power to control its docket, and compel attorneys to proceed within the time frame set by the court and not their own would erode and eventually disappear A trial court is entitled to say, under proper circumstances, that enough is enough . . . and less severe sanctions than dismissal need not be imposed where the record of dilatory conduct is clear."

Sanctions less severe than dismissal have been ineffective in past cases involving Counsel. Counsel has been disqualified, warned, sanctioned, censured and reprimanded for his past unprofessional conduct. See, e.g., Greene v. Environmental Protection Agency, 2002-SWD-1 (ALJ June 20, 2002); Johnson v. Oak Ridge Ops. Office, ALJ Case Nos. 95-CAA-20, 21, and 22, Order Barring Attorney Edward A. Slaven from Future Appearances (Feb. 4, 1997); Seater v. Southern Cal. Edison Co., ARB Case No. 96-013 (ALJ Case No. 95-ERA-00013), Post-Remand Order No. 7 (Feb. 4, 1997); Rockefeller v. United States Dep't of Energy, ALJ Case Nos. 98-CAA-10 and 11, Order Barring Counsel from Future Appearances (Sept. 28, 1998); Rockefeller v. Carlsbad Area Office (CAO, United States Dep't of Energy, ARB Case Nos. 99-002, 99-067, 99-068, and 99-063 (ALJ

Case Nos. 98-CAA-10 and 11, 99-CAA-1, 99-CAA-4, and 99-CAA-6) (Oct. 31, 2000); Williams v. Lockheed Martin, ARB Case Nos. 99-054 and 99-064 (ALJ Case Nos. 98-ERA-40 and 42) (Sept. 29, 2000); Lockheed Martin Energy Systems v. Slavin, No. 3:98-CV-613 (E.D. Tenn. Dec. 6, 1999); Pickett v. Tennessee Valley Authority, ARB Case No. 00-076 (ALJ Case Nos. 99-CAA-25 and 00-CAA-9) (Nov. 2, 2000); Erickson v. Environmental Protection Agency, 1999-CAA-2 (ALJ Jan. 2, 2002); Campbell v. Travelers Insurance Co., 2002 Tenn. LEXIS 43 (E.D. Tenn. 2002). Counsel continues to disregard and/or disobey the orders and warning issued by this Court, other ALJs, the ARB and the federal courts. Counsel has exhibited a drawn out history of deliberately proceeding in a dilatory manner and his continued disregard of the Court's Orders indicates that with anything less than dismissal, Counsel will never understand the severity of potential consequences for not complying with the Court's Orders.

Accordingly, the Court recommends that the Secretary enter the following order:

ORDER

The complaint of Terry O. Puckett is **DISMISSED WITH PREJUDICE**.

So ORDERED.

A handwritten signature in cursive script that reads "Larry W. Price".

LARRY W. PRICE
Administrative Law Judge

LWP:bab

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. See 29 C.F.R. §§ 24.7(d) and 24.8.